Supreme Court, U.S.
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No. 85-2046

In The
Supreme Court of the United States
October Term, 1985

LENORD S. HORWITZ, D.P.M.,
Appellant,

vs.

THE STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; and THE PEOPLE OF THE STATE OF COLORADO ex rel. Duane Woodard, Attorney General,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether a state medical board may suspend the license of a health care provider on a summary basis when presented with reasonable ground to believe that provider a threat to the public health, safety and welfare.

2. Whether due process requires all suspensions to end on a date certain when a statutory mechanism exists to alleviate undue delay in administrative proceedings.

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INTRODUCTORY STATEMENT

This is a motion to dismiss the appeal of a determination by the Colorado Supreme Court not to review a lower court decision. The Colorado Court of Appeals found discipline proceedings conducted by the Colorado Board of Medical Examiners devoid of constitutional defects and the Colorado Supreme Court declined to issue a writ of certiorari to review the Colorado Court of Appeals Decision and Order. Appellant seeks review of the Colorado Supreme Court decision through this appeal. In the alternative, appellant seeks issuance of a writ of certiorari.

This motion is based upon the absence of any substantial federal question in this case. In addition, the matter was conducted in conformity with due process of law, the prior decisions of this Court and all other applicable law. These reasons require dismissal of the appeal and establish that no writ of certiorari should issue.

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STATEMENT REGARDING THE FACTS

Certain facts are crucial to proper understanding of this appeal. So far as is possible these facts are set out below in chronological order.

The Order of Summary Suspension entered by the Colorado Board on December 21, 1983, contains a specific finding that reasonable ground exists to believe appellant is such a threat to the public health, safety and welfare as to require emergency action to suspend his Colorado

podiatry license on a summary basis. Appellant Appendix F, p. App. 40-41, para. 5. This is the finding required to support issuance of a summary suspension order by the Colorado Administrative Procedure Act, Colo. Rev. Stat. sec. 24-4-104(4) (1982). Appellant Appendix E, p. App. 18-19.

The Order of Summary Suspension followed receipt by the Board of a written report from another Colorado licensed podiatrist that appellant presented a threat to the public health, safety and welfare. This same report, dated December 12, 1984, was mailed to appellant at or about the same time it was delivered to the Board.

After the summary suspension order issued, service on appellant was attempted through certified mail, return receipt requested, as required by Colo. Rev. Stat. sec. 12-36-118(5)(b) (1985). Appendix 1, p. App. 1, *infra*. The receipt returned to the Board did not bear the signature of appellant, prompting efforts to serve him in person. This was accomplished January 3, 1984, although appellant contested that service. On January 4, 1984, counsel for appellant wrote the Chief of the Colorado Division of Hearing Officers to indicate awareness of the proceedings against his client and the existence of the order of summary suspension. Appendix 2, p. App. 2, *infra*.

On January 9, 1984, appellees filed an action in the state district court for Denver, Colorado, seeking a preliminary and permanent order that appellant cease engaging in the practice of podiatry while his Colorado podiatry license was suspended (Civil Action No. 84CV235). The state district court issued a temporary restraining

order forbidding podiatric practice by appellant on January 9, 1984. On that same date, appellant acknowledged the Board order of summary suspension. By agreement, the court order remained effective until May 11, 1984, when appellant returned to podiatry practice.

A hearing on the charges brought against appellant was held from January 19, 1984 until January 25, 1984. The Hearing Officer who heard the testimony issued an Initial Decision on February 6, 1984. Both parties filed responses to the Initial Decision within the statutory time limit, appellant on March 5, 1984 and appellees on March 7, 1984. See Colo. Rev. Stat. sec. 24-4-105(14) (1982). Oral argument on the Initial Decision was held before the Board on April 13, 1984. The final agency action in the form of a Board order reinstating appellant to licensure on probation issued May 1, 1984.

The entire administrative process involving this case was conducted without a single request for delay from appellees and without any time extensions granted to appellees. In addition, appellant took no action prior to issuance of the final board order on May 1, 1984, to change the scheduling of proceedings conducted by the Board. The Colorado Administrative Procedure Act, at Colo. Rev. Stat. sec. 24-4-105(10) (1982), provides that an appropriate state court can order an administrative agency to decide a matter in prompt fashion after a showing of undue delay. Appendix 3, p. App. 4, *infra*.

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SUMMARY OF THE ARGUMENT

In an emergency, a state medical board must suspend a health care provider license to protect the public from any health or welfare threat. No alternative to suspension exists when the ability of a health care provider to practice with skill and safety is in issue.

Notice to counsel of the Summary Suspension Order and notice to appellant of the supervisor report were provided.

The administrative proceedings were conducted within the applicable time limits and without the grant of a single extension to appellees. No action was taken to expedite the administrative proceedings or end the period of suspension despite the existence of a statutory mechanism for the alleviation of undue delay.

———o———

ARGUMENT

The Colorado Board of Medical Examiners acted in the face of an emergency when the podiatry license of appellant was suspended by service of the Board order in January 1984. The emergency existed when the Board received the written report of another licensed Colorado podiatrist stating that appellant was a threat to the public health, safety and welfare. As the report author was appointed by the Board to supervise appellant in his practice, the Board was entitled to rely on the report as reasonable ground to take emergency action. *Barry v. Barchi*, 443 U.S. 55, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979).

A real hazard to the health and welfare of patients exists when a licensed health care professional is unable to practice with skill and safety. When the existence of such a situation becomes known as it did here, that hazard outweighs any interest of the licensee in continued practice while the matter is heard.

The threat to patient health differentiates this case from *Cleveland Board of Education v. Loudermill,* 470 U.S. —, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Here no alternative to suspension existed to meet the threat perceived. Appellant was not a public employee who could be suspended with pay. His means of livelihood itself was the source of the hazard faced by the Board. The Board action was taken to alleviate the threat and preserve public confidence in the health care system.

Whether or not appellant was entitled to notice of the board action in response to the report from his supervisor, the record establishes that his counsel knew of the summary suspension order 5 days before that order was acknowledged as effective by appellant. Appendix 2, p. App. 2, *infra.* Appellant took no action respecting the summary suspension order before acknowledging its effectiveness. Moreover, appellant was mailed a copy of the report from his supervisor at the same time the report was provided to the Board in December 1983. Prior to his suspension, appellant took no action to dispute or refute anything in that report.

The administrative proceedings below took from December 21, 1983 until May 1, 1984. Every step of those proceedings was accomplished within the applicable time limits and without any extensions granted to appellees.

Appellant was not authorized to practice podiatry in Colorado from January 9, 1984 until May 11, 1984. During this interval, he took no action pursuant to Colo. Rev. Stat. sec. 24-4-105(10) (1982) to obtain a court order expediting the process because of undue delay. Appendix 3, p. App. 4, *infra*. This provision exists in the Colorado statute to insure that administrative proceedings provide a meaningful opportunity to be heard for all. Failure by appellant to make use of the device and establish undue delay while the delay was ongoing negates his due process claim here. In addition, the administrative proceedings took far less than the 9 months noted in *Loudermill, supra*, and this record contains no evidence that the mere passage of time deprived appellant of due process.

CONCLUSION

Because the Board acted in the face of an emergent threat to public health, based upon the report of an expert, summary suspension of a podiatry license was justified in this matter. Notice to appellant of the expert report was provided and his counsel knew of the summary suspension order well before it took effect. Appellant took no steps to expedite the proceedings while his license was suspended, despite the availability of a mechanism with which to do so. For all these reasons, it is apparent that no due process violation occurred in the proceedings below and that no substantial federal question is presented to

this court. Appellees request dismissal of this appeal and denial of the alternative petition for a writ of certiorari.

FOR THE ATTORNEY GENERAL

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APPENDIX 1

12-36-118. Disciplinary action by board.

. . . .

(5)(b) Upon the filing of a formal complaint, the board shall issue a citation, together with a copy of the complaint attached thereto. The citation shall require said physician to file with the board, within twenty days after service thereof, a written answer to the complaint. Such citation and complaint may be served by certified mail, return receipts requested, addressed to the physician at his last registered or known post-office address. The return receipts signed by the physician complained of shall be proof of service thereof. In the event that the physician refuses to accept such certified mail and sign the receipt therefor, the citation and a copy of the complaint may be served upon him as other process and proof thereof are made, all as provided in rule 4 of the Colorado rules of civil procedure. The time to answer shall commence from the date of service.

APPENDIX 2

Received by
Division of Hearing Officers
Jan 04 1984

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January 4, 1984

Edwin Felter, Esq.
Chief Hearing Officer
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HAND DELIVERY

Re: People vs. Leonard S. Horwitz, D.P.M.
Proceeding No. RG ME DAAED

Dear Mr. Felter:

This office represents Lenord S. Horwitz, D.P.M., with regard to the above-captioned proceeding.

We have been advised by our client of the commencement of the above-captioned proceedings and by the office of the Attorney General (Thomas J. Lyons, Esq.) of an Order of Summary Suspension issued by the State Board of Medical Examiners. In light of the same, it is our desire to obtain the speediest possible resolution of this matter.

Accordingly, it is our request of you that a pre-hearing conference be scheduled to occur during the week of January 2, 1984; that depositions of Dr. Stephen F. Albert and of two witnesses in the State of New York and one witness in the State of Massachusetts be taken during the week of January 9, 1984; and that formal disciplinary hearing be scheduled to occur during the week of January 16, 1984. We assume that since the office of the Attorney General saw fit to commence these proceedings, it should already be prepared for such hearing.

Thank you for your courtesy and accommodation of our request. We are available to discuss these matters with you and request that you act on the same as quickly as practicable.

Very truly yours,

HOCHSTADT, STRAW & STRAUSS, P.C.

/s/ Richard S. Strauss

RSS/rsg

cc: Thomas J. Lyons, Esq.
Lenord S. Horwitz, D.P.M.

APPENDIX 3

24-4-105. Hearings and determinations.

. . . .

(10) Every agency shall proceed with reasonable dispatch to conclude any matter presented to it with due regard for the convenience of the parties or their representatives, giving precedence to rehearing proceedings after remand by court order. Prompt notice shall be given of the refusal to accept for filing or the denial in whole or in part of any written application or other request made in connection with any agency proceeding or action, with a statement of the grounds therefor. Upon application made to any court of competent jurisdiction by a party to any agency proceeding or by a person adversely affected by agency action and a showing to the court that there has been undue delay in connection with such proceeding or action, the court may direct the agency to decide the matter promptly.

. . . .